No. 287.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

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Filed Nov. 15, 1901.

FERDINAND EIDMAN, U. S. Collector of Internal Revenue for the Third District of New York,

Plaintiff in Error below,

vs.

MIGUEL R. MARTINEZ, as Ancillary Administrator with the Will Annexed of SALVADOR ELIZALDE, deceased,

Defendant in Error below.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR DEFENDANT IN ERROR BELOW.

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Supreme Court of the United States.

FERDINAND EIDMAN, U. S. Collector of Internal Revenue for the Third District of New York,
Plff. in error below,

against

MIGUEL R. MARTINEZ, as Ancillary Administrator with will annexed of SALVADOR ELIZALDE, deceased,
Deft. in Error below.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Questions certified to this Court by the United States Circuit Court of Appeals for the Second Circuit, on the hearing of a writ of error to the Circuit Court of the United States for the Southern District of New York, in a suit therein brought by the defendant in error, ancillary administrator against the plaintiff in error collector, to recover the amount of certain taxes, on the passing of legacies and distributive shares which had been assessed by the plaintiff in error on certain securities found in the city of New York, and passing under the laws of Spain, and under the will of Salvador Elizalde, a citizen of Spain, who died in Paris, France, to

a legatee and distributee, who resided and resides abroad, and paid under protest by defendant in error, ancillary administrator, in which suit the plaintiff in error, collector, demurred to the complaint, and the demurrer was overruled by the Court, and, the defendant collector electing not to answer, but to stand on his demurrer, judgment was entered against him by said Circuit Court for $4,451.25 damages and costs.

Statement.

The statement of facts made by the Court below on which the questions are certified is substantially as follows:

Salvador Elizalde was a subject of the King of Spain. He had never resided in the United States. He died in Paris, France, April 27, 1899. He left a will in the Spanish language executed in Paris in the year 1891. He left a son, Arturo Elizalde, who is his sole next of kin, who, under the laws and treaties between France and Spain, became entitled to the possession and administration of all the personal property of the decedent.

The will was filed and protocolized in the office of the Spanish Consul in Paris. Said Arturo is the only son and sole next of kin of decedent. He is a Spanish subject and has never resided in the United States.

Said will gives all the property of decedent to said Arturo; but by the laws of Spain two-thirds of the property of decedent passed to said Arturo by force of the laws of Spain and but one-third passed by force of the will. In other words, said Arturo was a forced heir to the extent of two-thirds of the property left by the deceased.

Certain federal, municipal and corporate bonds belonging to the deceased were, at the time of his death, in the custody of his agents in the city of New York in the Third Collection District.

Arturo Elizalde entered upon the administration of the estate of his father and pursuant to § 2695 and 2696 of the New York Code of Procedure appointed defendant in error Martinez his attorney to receive ancillary letters in New York, and such letters were issued to him by the Surrogate of the County of New York, and thereupon said Martinez took possession of said bonds.

Upon the passing of the said legacy and distributive share to Arturo Elizalde the U. S. Internal Revenue Collector assessed a tax of $4,293.76. Defendant in error paid the tax upon the compulsion of the collector's threat of distraint and sale and under protest and made due application for refund, which was rejected, and thereupon brought suit in the Circuit Court below against the collector to recover the tax and to his complaint the collector demurred. The demurrer was overruled and judgment entered thereon for the amount claimed, and the collector took a writ of error to the Circuit Court of Appeals which certified two questions:

1. Is any tax imposed by the 29th and 30th sections of the Act of June 13, 1896, upon the passing of any legacy arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile pursuant to the laws thereof by which he gives all his property to a non-resident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

2. Is any tax or duty imposed by the 29th and 30th sections of the Act of Congress of June 13th, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes" upon the passing of any distributive share arising out of the personal property of a non-resident alien who has never resided or had a domicile

within the United States and who dies without the United States in the year 1899 intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a non resident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

See Record, pp. 1 and 2.

In the first question as *printed* in the record, there is a clerical error of the date of the Act of Congress—viz., 1896, which obviously should be 1898.

It is correctly stated in the second question and also in the statement of facts on p. 1.

POINTS

First—The statute under which these questions arise was passed by Congress June 13, *1898*. 30th. Stat. at Large, ch. 448, p. 464.

It imposes a tax on the passing of legacies and distributive shares arising from personal property passing after the passage of the act from any person possessed of such property "*either by will or by the intestate laws of any State or Territory.*"

In this case the property did not pass by the distributive laws of any State or Territory. Two-thirds of it did pass by the *distributive* laws of Spain.

One-third of it did pass by a will—but the will was executed according to the laws of Spain by an alien never residing or domiciled in the United States.

The question is: do the words of the statute, "passing * * * either by will or by the intestate laws of any State or Territory," cover this case?

If the property were not actually found here, of

course no one would pretend that the statute covered this case. The whole matter would be outside of our jurisdiction.

Does the fact that personal property is actually found here make any difference? If it makes none as to that passing by the distributive law of Spain outside of the will, does it make any as to that passing by the will?

It should also be here stated that the act of 1898 so far as these questions are concerned, is in the very words of the legacy and distributive share act of 1864, and that before the enactment of the act of 1898 the act of 1864 had been subjected to judicial construction. See 13 Stat. at Large, p. 285, § 124.

Second.—We desire most strenuously to impress upon the Court the point that the law in question must be strictly construed in favor of the exemption or non-inclusion of this property.

It is scarcely necessary to cite authority to show that laws imposing taxes are to be strictly construed, except such parts of them as are remedial in their nature. The English cases on this subject are clear and consistent. In Warrington *vs.* Furbor, 8 East., 242, at 247, Lord ELLENBOROUGH said:

> "Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception confining the operation of the duty."

And in William *vs.* Sangar, 10 East., 66, at page 69, he said:

> "In the construction of these tax acts we must look to the strict words, however we may sometimes lament the generality of the expressions used in them; but we must construe those

words according to their plain meaning with reference to the subject matter."

In Denn *vs.* Diamond, 4 B. & C., 225, at page 245, the Court said:

> "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language."

In Tompkins *vs.* Ashby, 6 B. & C., at page 541, it was said:

> "Acts of Parliament imposing duties are so to be construed as not to make any instrument liable to them, unless manifestly within the intention of the legislature"

And in Doe *vs.* Smith, 8 Bing., 142, at page 152, the Court said:

> "As all stamp acts, being a burden on the subject, must be clearly expressed wherever they impose the burden, I should say that, even if there were doubt, we should take the smaller sum."

In Wroughton *vs.* Turtle, 11 Mees. & W., 561, at page 567, the Court said:

> "It is a well settled rule of law that every charge on the subject must be imposed by clear and unambiguous words."

This rule of construction has been repeated and approved in many other cases in England. See Marquis of Chandos *vs.* Commissioner of Inland Revenue, 6 Exch., 464, and Gurr *vs.* Scudds, 11 Exch., 190, in which it was said:

> "If there is any doubt as to the meaning of the stamp act it ought to be construed in favor of the subject, because a tax cannot be imposed without clear and express words for that purpose."

"It is a well-settled rule of law," says Dwarris on Statutes, 749, "that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that, where the public are to be charged with a burden, the intention of the Legislature to impose that burden must be explicitly and distinctly shown."

We concede that remedial provisions contained in revenue laws do not come within the rule for which we are now contending, but are to be liberally construed.

See

Taylor *vs.* U. S., 3 How., 197.
Cliquot Champagne Case, 8 Wall., 114.
U. S. *vs.* Hobson, 10 Wall., 395.
Smythe *vs.* Fiske, 23 Wall., 374.

Judge COOLEY, in a note referring to the case of Taylor *vs.* United States, cited above, says:

> "The opinion in this last case was given by Mr. Justice STORY, and the language made use of, which consists largely in a quotation from the opinion given in the lower Court, does not express his own views so clearly as was customary with that learned Judge. What is manifest in his opinion is that the point was not regarded as of importance in that case, the meaning of the statute being plain; and while the distinction pointed out by the lower Court between penal and remedial laws is approved, and shown to be in accordance with the authorities, it is not clear that the general remarks of the Judge were intended to go further. It would have been a remarkable circumstance if

> Mr. Justice Story had overruled his own opinion, delivered so recently that, at that time, his son [and reporter] had not issued the volume containing it" (Cooley on Taxation, 205).

The opinion last referred to in this extract was given in the case of United States *vs.* Wigglesworth, 2 Story, 369, in which Mr. Justice STORY said:

> "In the first place it is, as I conceive, a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws, or laws found upon any permanent public policy, and, therefore, are not to be liberally construed."

It was said also by Mr. Justice NELSON in Powers *vs.* Barney, 5 Blatch., 202, that duties "are never imposed upon the citizen upon vague or doubtful interpretations;" and in U. S. *vs.* Watts, 1 Bond, 580, at page 583, it was said:

> "The * * * revenue laws can not be so construed as to extend their meaning beyond the clear import of the words used."

Third.—Statutes similar to the U. S. statute in question have always been held not to cover a

legacy given in a will of a foreign domiciled testator or a distributive share passing by the laws of a foreign country wherein the deceased was domiciled at the time of his death.

The English Legacy Tax Act of 1796 is in the following language:

"§ 2. And be it further enacted that upon every legacy, specific or pecuniary, or of any other description of the amount or value of twenty pounds or more given by any will or testamentary instrument of any person who shall die after the passing of this act out of the personal estate of the person so dying and also upon the clear residue and upon every part of the clear residue of the personal estate * * * which shall remain after deducting debts, funeral expenses and other charges * * * or upon intestacy there shall be raised, levied, collected and paid * * * the several duties, and after the rates and in manner following."

36 Geo. 3d, c. 52; Hanson Death Duties, p. 391 *et seq.*

This and our statute are substantially identical. The one levies a duty on a *legacy* "given by *any* will and upon the clear residue in case of intestacy of any person who shall die after the passing of this act." The other levies a duty or tax on legacies or distributive shares "passing after the passage of this act * * * either by will or by the intestate laws of any State or Territory."

The two sets of words describe the same event as the occasion for the tax and levy the tax in respect to the same thing and upon the same person or persons, *i. e.*, upon the legatee or distributee.

The English Courts in construing their statute have without a single exception held that the statute did not cover a legacy given by the will of one domiciled abroad or a distributive share of the estate of one domiciled abroad.

In Thomson *vs.* Advocate General, 12 Clark & Finelly, 1, it was held that a legacy given by the will of one domiciled in Demarara was not taxable under the act, although the property consisted of a debt due to the deceased from one living in Scotland, to collect which the legatee had taken out letters in Scotland.

The decision was *placed* upon the specific ground that the language of the act, though general, must be restricted in its application to legacies or distributive shares passing from a person domiciled in Great Britain and did not apply to those domiciled elsewhere because of the maxim *mobilia sequuntur personam.*

There was no other question in that case and the decision was unanimous.

That decision has never been challenged in any respect in England.

In 1853 the succession tax was passed in England (16 & 17 Victoria C., 51), and is in these words:

"Every past or future disposition of property by reason whereof any person has or shall have become beneficially entitled to any property or the income thereof upon the death of any person * * * shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession."

In 1859 the question of the construction of this act came before the Court in Matter of Lovelace's Settlement, 61 Eng. Ch. Rep. (4 De Gex and Jones), 340.

That was a case of a marriage settlement between English people wherein the woman transferred certain property to English trustees upon certain trusts and in certain contingencies reserving a power of appointment. After marriage the parties removed to France and died, Mrs. Lovelace dying last, and having exercised the power.

The question was whether succession duty was payable.

It was held that it was, on the ground that the property was owned by the trustees in England and was not part of Mrs. Lovelace's estate at her death in which case it would not have been liable to legacy duty (see p. 351).

In 1864 the same question came before the Court in the Matter of Wallop, 66 Eng. Ch. Rep. (1 De Gex' Jones & Smith), 656, and was decided the same way.

In this case the settlement was made by the will of an English resident and gave property to trustees upon certain trusts and finally to the appointees of his daughter, who, after her father's death married, moved abroad, appointed by will and died.

The Court held that no legacy duty was payable—(p. 669-670), but held that a succession duty was payable.

In 1865 the question arose in Wallace *vs.* Attorney Gen'l and Jeves *vs.* Shadwell, L. R., 1 Ch. Appeals, 1, whether a succession duty is payable because of personal property being in England where the testator died domiciled in France.

This case in its facts is like that of Thomson *vs.* Advocate General, and differs from the two preceding in that there was no settlement or trust in England, and the question arose of the application of the *succession* tax law to a mere case of a "disposition" by will of one domiciled in a foreign country.

It was held that no succession tax was payable.

Lord Cranworth said that no succession tax could be payable unless one became "Entitled by virtue of the laws of this country."

In 1872, the case of Attorney-General *vs.* Campbell, L. R., 5 Eng. and Irish Appeals, 524, came before the House of Lords.

It was the case of a *settlement* and the property was in the hands of English trustees and a subsequent devolution was held to be subject to a succession duty.

On p. 530 Lord Westbury speaks of the contention of the Crown in Wallace *vs.* The Attorney-General, L. R., 1 Ch. App., 1, as "where the extraordinary conclusion was contended for that under the *will* of a gentleman dying domiciled abroad the first legatee, though he was not liable to legacy duty, became liable to succession duty under the Act." italics ours.

In 1872, also the case of Lyall *vs.* Lyall, L. R., 15 Equity Cases, 1 42 L. J. N. S., Part 1, p. 195, came before the Master of the Rolls, Lord Romilly.

In that case there was a marriage settlement and the property vested in trustees domiciled in England, and the quession was as to a *succession* tax.

This case is remarkable for the discussion by Lord Romilly of the preceding cases and his vigorous dissent from the doctrine that an English settlement and the fact that the trustees were domiciled in England, made the estate of foreign beneficiaries liable to the succession tax.

In the opinion of Lord Romilly the doctrine of Thomson *vs.* Advocate-General and of Attorney-General *vs.* Wallace should apply, and such estates not be subject to the succession tax.

In deference, however, to the decision in Attorney-General *vs.* Campbell he held that the estate was liable to succession tax, although he says, p. 15, that "it appears to me that the distinction drawn between the two statutes is extremely thin, and that the arguments against legacy duty as stated in Thomson *vs.* Advocate-General apply with equal force to the words of this statute," meaning the succession statute.

In 1877 in Cigala Settlement Trusts, L. R., 7 Ch. Div., 351, the same doctrine was held. The property was "vested in trustees subject to British jurisdiction," *i. e.*, domiciled in England and because of that was held subject to the succession tax.

The last case in England is that of Atty.-Gen'l. *vs.* Jewish, &c., Asse., L. R., 1900, 2d Q. B. D., 556.

and affirmed in the Court of Appeals, L. R., 1901, 1 Q. B. D., 123.

Both below and on appeal the decision holding that the succession tax was payable was put directly on the ground that there were English trustees holding the property and thus the property was owned by Englishmen and passed by the law of England.

The doctrine of Thomson *vs.* Advocate-General is fully recognized and the case decided on the doctrine of English settlements.

Clearly then it is the law of England, that where a legacy taxing statute is phrased in general terms and does not directly state that personal property of one domiciled abroad, found in England, shall be subject to the tax, such personal property of one domiciled abroad is not subject to the tax.

Whether the doctrine of the English Courts in respect to a succession tax be sound is not here important, as the case presents no facts to raise such questions and there is here no succession tax applicable to personal property.

Coming now to the decisions of the Federal Courts.

The case of U. S. *v.* Hunnewell, 13 Fed. Reporter, 617-618, decided by the U. S. Circuit Court in Massachusetts in 1882, arose under the United States statute of 1864, the language of which, in § 124, is for all purposes here concerned identical with the language of section 29 of the act of 1898.

The case was heard by Gray & Lowell, J. J., and the opinion given by Gray J., then and now an Associate Justice of this Court.

The direct and only points decided were two: 1. That alien personal property found here did not "pass" by the instestate laws of any State or Territory, but by the law of the domicile of the alien. 2d. That the U. S. Statute of 1864 "does not make the duty payable when the person possessed of such property dies testate if it would not be payable if such person died intestate."

The case of U. S. *vs.* Morris, 27 Fed. Rep., 341, decided in 1886, was a case precisely similar to the Hunnewell case, and in an opinion of six lines was decided by Butler, J., in the same way.

The case of Matter of Enston, 113 N. York, 174, decided in 1889, deserves attention.

The statute in question in that case read as follows: "After the passage of this act all property which shall pass by will or the intestate laws of the State from any person who may die seized or possessed of the same, while being a resident of the State, *or which property shall be within this State*, or any part of such property or any interest therein or income therefrom transferred by deed" * * * to take effect in enjoyment after death.

The words "or which property shall be within this State" were held to apply to gifts *inter vivos* to take effect in enjoyment after death and not to the preceding part of the statute covering property passing by will or intestate laws according to the rule of construction contended for in our first point; see especially p. 178, *et seq.*

It would not have required any great judicial effort to construe those words as applying to legacies or distributive shares and yet the New York Court of Appeals construed the act as not covering the case of the will of one domiciled in another State.

All these decisions were made after the repeal of the Act of 1864 and before the enactment of the Act of 1898.

Since the Act of 1898 the case of Ruckgaber *vs.* Moore, Collector, 104 Fed. Rep., 947, has been decided in accord with our contention. The opinion of Thomas, District Judge, is exhaustive.

In addition to all the foregoing we have the fact that in his annual report for 1900 the Commissioner for Internal Revenue recommended to Congress that section 29 of the Act of 1898 be amended by inserting after the word "otherwise" the words "including persons residing abroad" and by inserting

in section 30 after the words "shall pay to the collector or deputy collector of the district in which the deceased person was a resident," the words "or in which the property was located in case of non-residents."

These amendments if made would make the statute plain in favor of the contention of the Government. They were advised by the Commissioner, after the question had been raised, for he says that his office "had ruled on the law as it stands that the tax accrued but that it would be preferable to have the law specifically so declare as it has been contended otherwise" See Secretary of the Treasury Annual Report of 1900, p. 617.

In the session of Congress at which this report was submitted, the Act of 1898 was amended in other particulars suggested by the Commissioner, but not in any way affecting the above question and not as requested by the Commissioner in his report.

We submit that this action and non-action makes it clear beyond question that Congress was content with the judicial construction given to the old act and intended that the Act of 1898 should be similarly construed.

Fourth.—But we are not compelled to rely merely upon the decisions of the English and American Courts, which show that the general terms employed in that part of the statute which imposes the tax, do not apply to foreign personal estates, because the act now under consideration contains numerous provisions showing affirmatively that it was not the intention of Congress to impose a duty upon the passing of legacies or distributive shares arising out of the personal property of alien non-resident decedents; and in this respect it differs from the English and New York statutes to which we have referred. The whole structure of the statute shows that its sole pur-

pose was to impose the duty on legacies and shares arising out of the estates of resident decedents, and it imposes that duty no matter whether the personal property is actually situated here or abroad.

The language of the first clause of the act already referred to expressly confines the duty to distributive shares passing "by the intestate laws of any State or Territory," and we think no argument is necessary to show that Mr. Justice Gray was correct when he said in the Hunnewell case that the duty is not payable "when the person possessed of such property dies testate, if it would not be payable if such person died intestate."

Under the act the administrator or executor "before payment and distribution to the legatees or any parties entitled to beneficial interests therein shall pay to the Collector or Deputy Collector of the district in which the deceased person was a resident, the amount of the duty or tax assessed upon such legacies or distributive shares," and it also provides that he shall make and render "to the said Collector or Deputy Collector, a schedule, list or statement in duplicate of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue thereon, verified by his oath or affirmation * * * which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest." The ancillary administrator of a foreign estate cannot make and verify this report. He does not make distribution to the legatees or to anyone entitled to a beneficial interest, and he has no means of ascertaining the "clear value of such interest." No attempt was made in this case to ascertain the clear value of the interests of the legatee and distributee of Elizalde, but the Collector imposed the duty upon the whole value of the

property found in this country, without reference to the costs of administration or the indebtedness of the estate in Spain or France. This unjust method must be adopted in every case, if the act applies to estates of alien non-resident decedents, because the ancillary administrator does not make a final settlement of the estate, but simply turns over the amount in his hands to the principal administrator or executor abroad, who alone can ascertain and verify the clear value of each interest.

It will be observed also from the quotation we have made from the statute that no provision whatever is made for the assessment or collection of the duty in such a case as the present, but that on the contrary, the authority of each of the several collecting officers is expressly limited to cases where the decedent was at the time of his death, a resident of the collection district in the United States for which such officer is appointed.

In the same section from which we have quoted (Sec. 30), it is provided that the Collector or Deputy Collector shall execute a receipt, or receipts, for the duty when paid, and that "such receipt, or receipts, duly signed and delivered * * * shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators."

We submit that these provisions of the stattue are wholly inconsistent with the theory that legacies and distributive shares arising out of personal property left by a non-resident alien decedent, are subject to the duty, and that the whole amount collected in this case must be returned.

Fifth.—That Congress, by enacting the law of

1898, in the precise words of the law of 1864, meant and intended to adopt the construction which the Courts had given to the law of 1864, and which the English courts had given to a similar English law would seem plain.

With knowledge of such decisions, which surely must be imputed, the enacting of a new law in the words of the old, but intending a different meaning, would be unthinkable folly, of which we submit that this Court would not be justified in assuming that Congress could be guilty.

In the case of *Interstate Commerce Commission* vs. *B. & O. R. R. Co.*, 145 U. S., 263, this Court had occasion to construe the third section of the Interstate Commerce Act (24 Stat., 379, C. 104). Mr. Justice BROWN, in delivering the opinion of the Court, says, at page 282:

> "The English Traffic Act of 1854 contains a clause similar to Section 3 of the Interstate Commerce Act, that 'no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'"

The Court then cites several English cases construing the Traffic Act, and continues at page 284:

> "These traffic acts do not appear to be as comprehensive as our own and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. *But so far as relates to the question of* "*undue preference*," it may be presumed that Congress, in adopting the language of the

English act, had in mind the constructions given to these words by the English courts and intended to incorporate them into the statute (*McDonald* vs. *Hovey*, 110 U. S., 619)."

In the case last cited this Court says:

"It is a received canon of construction, acquiesced in by this Court,

"That where English statutes, such for instance as the Statute of Frauds and the Statute of Limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority" (Pennock *vs.* Dialogue, 2 Pet. 1, 18; Smith's Commentaries on Stat. & Const. Law, § 634; Sedgwick on Construction of Stat. and Const. Law, 363)."

McDonald vs. *Hovey*, 110 U. S., 619, at 628.

The authorities on this point are reviewed in the following note to the report of the case of *Ryalls* vs. *Mechanics Mills*, 5 L. R. A., 667, in which case the Supreme Judicial Court of Massachusetts, in construing an employer's liability act passed by the State Legislature—which was a substantial copy of the English Employers' Liability Act—adopted the construction given to that act by the English Courts. The note is as follows:

"Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the Legislature of the same State or country, or by that of another, that construction is to be given to the later statute (Com. *vs.* Hartnett, 3 Gray, 450; Ruckmaboye *vs.* Mattichund, 32 Eng. L. & Eq., 84; Bogardus *vs.* Trinity Church, 4 Sandf.

Ch., 633; Rigg *vs.* Wilton, 13 Ill., 15; Adams *vs.* Field, 21 Vt., 256).

"It is to be presumed in such case that the Legislature who passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law" (Potter's Dwarris Statutes, 274).

Sixth.—The legal principle established by these cases is that personal property which had belonged to one deceased *is actually* situated in the place where the deceased was domiciled at the time of his decease.

True, the actual situation of the personal property may be different; but for all legal purposes, and especially with respect to tax laws and succession laws, it is conclusively presumed to be situated in the place of the domicile of the deceased and passes according to the law of such domicile.

This quite truly is said to be a legal fiction; but as was said by ANDREWS, J., in the Enston case, 113 N. York, 181, "it is a fiction which must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent."

But it is claimed that this foreign law operates only by virtue of comity, and in the State of New York by statute, and that the true aspect is that the law of this State, comity or statute, provides that the property shall pass according to the foreign law.

Such is not the fact.

The general, and we may say universal, rule—the law common to all nations—is that personalty follows the person, and that the sovereignty having jurisdiction over the person has jurisdiction over

his goods. It is a rule of disclaimer of the Government where the goods and not the person are found, and it is a rule of assertion where the person is domiciled though the goods are elsewhere.

That the rule is founded on a fiction is true, but the very fact of the fiction shows that, in the conflict of laws, the fiction is resorted to in order to establish the sovereignty of the domicile over all goods wherever situated, and the disclaimer of sovereignty by all sovereigns where goods of one domiciled elsewhere are found. The *fiction* is that the property is *actually situated* at the domicile and *is not* anywhere else.

In other words, it is the law of the country where goods are found belonging to one domiciled elsewhere, not that the goods shall pass according to the law of the domicile, but that such goods are subject only to the sovereignty of the domicile; that the law governing them is the law of the domicile, on the fiction that such goods *are actually there situated*.

If it were the law of this country that applied there would be no need of the fiction. It is because we accept and concede to the fiction that we concede the domicile sovereignty.

Of course, any sovereignty can make another law. Within its territorial limits it is absolute, and as to all things therein situate it can provide as it pleases. When, however, it provides by statute in accord with the fiction, the statute is declaratory only, and makes no new law; and when it provides in opposition to the fiction it claims and asserts a new sovereignty or jurisdiction and enacts a new law.

It is believed that in all cases where a succession tax has been intended to act in opposition to the fiction the fact has been stated in plain and unmistakable language.

In the Enston Case, 113 New York, 181, ANDREWS, J., said: "It is a general rule of law that such property attends the owner and has its *situs* at his domicile. It is true that that is a fiction of the

law, but it is a fiction which must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent."

Pursuant to the rule so established that such property "*has its situs at his domicile*," the New York statute was amended so as to cover property actually found here, although the owner was domiciled elsewhere. And this prior to the enactment of the law of congress of 1898, enacting the legacy tax.

1 Dos Passos on Inheritance Tax Law, 2d Ed., pp. 426-442-3. So Laws of New Jersey, *Ib.*, 459, of Penn., *Ib.*, 467, of Mass., *Ib.*, p. 477, of Maine, p. 484, of Ohio, pp. 489 and 493, of Conn., *Ib.*, p. 498, of Maryland, p. 503, of California, *Ib.*, p. 510, of Illinois, *Ib.*, p. 518, provide in express terms that property found in their States is subject to the tax notwithstanding that the owner was domiciled elsewhere.

In the absence of some statute law enacting that the *situs* of personal property is *not* that of the domicile of its owner, and *is* that where it is actually found, the law which governs and controls it is unquestionably that of the owner's domicile, and in case of death it passes by that law, not because the law where it is found so holds, but because by fiction of law its *situs*, the place where it is, is conclusively presumed to be that of the domicile of its owner.

As we have seen, many States—indeed, we think that all which have passed a succession tax law—have provided in plain terms for taxing property found within their borders, whether that of residents or non-residents. The United States has not.

The doctrine has been most emphatically adjudged in the New York Court of Appeals in Cross *vs.* United States Trust Co., 131 N. Y., 330. On pages 339-341 the Court says: "It is a general and universal rule that personal property has no local-

ity. It is subject to the law of the owner's domicile as well in respect to a disposition of it by act *inter vivos* as to its transmission by last will and testament and by succession upon the owner dying intestate." * * *

Should our Legislature deem it for the public good to repeal the statute relating to wills and to provide that all property should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property actually within the territory of the State, but owned by a person domiciled in another State, would still be valid, provided it was valid by the law which governed the owner."

In view of the general principle of law that the *situs* of personal property is that of its owner's domicile; in view of the statutes of the several States; in view of the unbroken line of decisions as to the construction of statutes not containing the express provisions for taxing property of non-residents, we submit that it is impossible to adopt the forced construction claimed by the government that this property passed under the law of any State or Territory of the United States.

Seventh.—There is no equitable, economic or legal principle because of which the contention of the Government should be sustained.

The State laws taxing personal property where found should not be followed. They are unwise and barbarous, and ultimately, whenever tax laws are enacted with any reference to economic or moral laws, will be repealed.

Assuming that the laws of two States or two countries are alike, and that each taxes the whole estate of one dying domiciled therein, and also all property found within its borders, though belonging to one domiciled in the other, it must follow

that the property found in one State of a person domiciled in the other is taxed in *both* States—*i. e.*, is doubly taxed, or is the object of double taxation.

That such double taxation is an evil and a wrong would seem plain.

All taxes are assessed on some person, and, although by reason of their being assessed in respect to or by reason of property owned by the person, we have contracted the habit of speaking of assessing or taxing the property, yet the least reflection satisfies us that the tax is on the person, in respect to the property, and not on the property.

That a person should be taxed in two States at the same time in respect to the same property, shocks the conscience. Even Judge VANN, who leads the judicial world in the effort to subject every man to the payment of every tax, and, apparently, regards the payment of taxes as the chief end of man, deprecates double taxation, and, in his dissenting opinion in *Matter of Bronson*, on page 24 of 150 New York, while he says that "double taxation is admitted to be an evil," attempts to justify it in a succession tax only as a punishment for the deceased owner having *probably* escaped taxation on personal property during his life.

If the learned Judge had been half as good an economist as he is lawyer he would know that no personal property in this or in, we think, any of the States, escapes taxation, except because of the absurd provision of law allowing the deduction of debts from the valuation of personal property and including choses in action, in the definition of personal property.

If the Union of the States means anything, it certainly should mean the adoption of such tax laws as would make impossible the taxing of the same person in respect to the same property by two

or more States at the same time; and the principle is the same as to two independent nations.

In a less civilized age and as a consequence of the grasping cupidity, once prevailing among nations as among men, one may imagine the prevalence of a rule such as that suggested on pages 30, 31, of 150 New York, to the effect that the *situs* should or should not be held to follow the person according as one or the other rule would make the person subject to tax. All such laws are, of course, subject to reprisals, and they must either become universally followed or universally abandoned.

Congress has shown a wise judgment in adhering to the old rule and in making no effort to subject an estate to the rank injustice of double taxation.

Its law reaches every domiciled resident and taxes him in respect to his personal property whatever its actual *situs*. The law of other countries does the same. The law of no country should go beyond that and try to reach personal property not owned by those domiciled in it.

Each nation should either

1. Follow the rule *mobilia sequuntur personam* and tax estates of those dying domiciled within its borders wherever situate and not tax estates within its borders where the owner dies domiciled abroad, or

2. Ignore the rule "*mobilia*, &c.," and tax only the estates found within its borders.

Either rule would avoid double taxation and perhaps either would be fair enough.

The two cannot possibly co-exist without double taxation and without a moral injustice which shocks the conscience.

We must remember in favor of the "*mobilia*" rule that if we do not tax the alien whose property is here we do tax our own citizens whose property is not here and that their property is not taxed in the sovereignty where it actually is.

The rule founded upon "*mobilia*, &c.," has the great advantage that it actually prevails in modern civilized nations (14 Howard, 424, last paragraph) and it is a rule which our States in their relations with each other must ultimately adopt unless we are to become the worst tax ridden community in the world. Not to adhere to it now in the United States Courts would be plain judicial legislation and of the most reactionary character.

It would be a return to the barbarous idea that stranger and enemy are synonymous and not to be considered in domestic legislation—it would be ignoring the friendship and amicable relations that do and should prevail not only among nations but among their peoples, and it would represent an indifference to moral standards as applying to our intercourse with those outside of our borders.

As to real estate, the *locus* rule has always prevailed. So far as we know, no political community has ever attempted to tax its citizens in respect to lands situated outside of its own borders. The moral injustice of such an attempt has always been recognized.

The adoption of the converse rule for personal property has been equally general.

It has remained for our respective States to first endeavor to tax personal property under both rules.

The legislation of the United States has not followed that of the States.

Surely the United States Courts should not overrule the definite policy of Congress.

The "*jus gentium*" of the civil law is not synonymous with the "Law of Nations" as this last phrase is commonly understood

"*Jus gentium*" means "the law common to all nations"

"Law of Nations" means the law prevailing between nations.

"*Jus gentium*" has the sanction of any and all municipal laws.

"Law of Nations" has no legal sanction, and is supported only by the sanction of public opinion and the ultimate sanction of force or war.

The meaning and sanctions of the "*jus gentium*" and of the "Law of Nations" are fully discussed and elaborated in Austen's "Province of Jurisprudence Determined," and we know of no writer on the subject who has differed with him.

Under the civil law it was thought that there were some principles of such plain and obvious justice and morality that every political organization enacted them into municipal law. Of such were the laws, "Thou shalt not kill; thou shalt not steal; he who breaks his contract shall pay the damages caused thereby," and many others.

Is it not obvious that the condition of mankind would be greatly benefited by the greatest extension of the number of laws that are "common to all nations?"

The first result would be an almost infinite reduction of the causes of war, that worst scourge of the human race.

Here in this case is a brilliant opportunity for this Court, which is without a peer in the world, to lend the weight of its great name and prestige to aid the doctrine and to obtain the benefit of uniformity of law on a great subject throughout the world.

We know of no political community where the doctrine of "*mobilia sequuntur personam*" does not obtain. We know of no political community where it has been enacted that personal property of one domiciled elsewhere shall be taxed, save in some of the States of this Union. There may be such, but we dont know of them.

Can, however, this Court have a loftier or more beneficial function than to say that a law which is common to so many nations is also the law of this nation, and that it is well worthy the consideration of the several States of the Union

which have enacted otherwise to consider whether the rhythm of human progress, slow enough at the best, does not require them also to conform their laws on this subject to the "*jus gentium*"; the law common to the rest of the world?

It would be an emphatic note, struck here, but with the world in unison.

Eighth.—The questions should be answered in the negative.

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Of Counsel for Deft. in error below.

No. 287.

FILED
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Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Dec. 2, 1901.

No. 287.

FERDINAND EIDMAN, United States Collector of Internal Revenue for the Third District of New York,

Plaintiff in Error,

against

MIGUEL R. MARTINEZ, as Ancillary Administrator with the Will Annexed of Salvador Elizalde, deceased,

Defendant in Error.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR IN COURT BELOW.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

FERDINAND EIDMAN, United States Collector of Internal Revenue for the Third District of New York,
Plaintiff in Error,

AGAINST

MIGUEL R. MARTINEZ, as Ancillary Administrator with the Will Annexed of Salvador Elizalde, deceased,
Defendant in Error.

No. 287.

On Certificate from the United States Circuit Court of Appeals for the Second Circuit.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR IN COURT BELOW.

The questions of law certified by the Circuit Court of Appeals are as follows:

> "1. Is any tax imposed by the 29th and 30th sections of the Act of Congress of June 13, 1898, entitled 'An Act to provide ways and means to meet war expenditures and for other purposes,' upon the passing of any legacy arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile pursuant to the laws thereof by

which he gives all his property to a non-resident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

"2. Is any tax or duty imposed by the 29th and 30th sections of the Act of Congress of June 13th, 1898, entitled "An Act to provide ways and means to meet war expenditures and for other purposes" upon the passing of any distributive share arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899 intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a non-resident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value?"

See Record, p. 2.

We do not claim that Congress has no power to tax the property of non-resident alien decedents. Our contention is that the duty provided for by the statute under discussion is not a tax upon the property of decedents, but upon the passing of a legacy by will to a legatee, and upon the passing of a distributive share to the person entitled thereto by the intestate laws of a State or Territory; that Congress did not intend to impose, and did not impose, any tax upon the passing of the property of non-resident alien decedents, whether testate or intestate; that whatever legacies and distributive shares pass to the legatee and distributee of an alien decedent, he receives in a foreign jurisdiction by virtue of the laws of the decedent's domicile, and after the duties and other charges imposed thereon by foreign laws have been deducted; and that, therefore, the ancillary administrator here did not hold any legacies or distributive shares subject to taxation under the act.

FIRST.

THE TAX IMPOSED BY THE 29TH AND 30TH SECTIONS OF THE ACT OF CONGRESS OF JUNE 13TH, 1898, ENTITLED "AN ACT TO PROVIDE WAYS AND MEANS TO MEET WAR EXPENDITURES AND FOR OTHER PURPOSES," IS NOT A TAX UPON THE PASSING OF THE ESTATE OF THE DECEDENT BUT UPON THE PASSING OF A LEGACY TO A LEGATEE BY A WILL OR OF A DISTRIBUTIVE SHARE TO A PERSON ENTITLED THERETO BY THE INTESTATE LAWS OF A STATE OR TERRITORY.

(a) This is a legacy tax as distinguished from a probate or estate or succession duty.

At the outset it is necessary to determine the exact subject matter upon which a tax or duty is imposed by this act as construed by this Court in the case of *Knowlton vs. Moore*, 178 U. S., 41.

We quote the act with the matter added in Section 29 to Section 124 of the Act of 1864 in **black letter,** matter omitted therefrom in *italics*, bracketed, and the portions of the act to which we shall have particular occasion to refer in SMALL CAPITALS. Section 30 is identical with Section 125 of the Act of 1864 except that the word "collector" is substituted for the word "assessor."

"ACT OF JUNE 13TH, 1898, 30 STAT., 448, 464.

"LEGACIES AND DISTRIBUTIVE SHARES OF PERSONAL PROPERTY.

"SEC. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, ANY LEGACIES OR DISTRIBUTIVE SHARES arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of **ten thousand** [*one thousand*]

dollars in actual value, PASSING, after the passage of this act, FROM ANY PERSON POSSESSED OF SUCH PROPERTY, EITHER BY WILL OR BY THE INTESTATE LAWS OF ANY STATE OR TERRITORY, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows—that is to say: **Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:**

"FIRST. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property as aforesaid, at the rate of **seventy-five cents** [*one dollar*] for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST IN SUCH PROPERTY.

"SECOND. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of **one dollar and fifty cents** [*two dollars*] for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST.

"THIRD. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of **three** [*four*] dollars for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST.

"FOURTH. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of **four** [*five*] dollars for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST.

"FIFTH. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of **five** [*six*] dollars for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST:

"*Provided*, THAT ALL LEGACIES OR PROPERTY PASSING BY WILL, OR BY THE LAWS OF ANY STATE OR TERRITORY, TO HUSBAND OR WIFE of the person died possessed, as aforesaid, shall be exempt from tax or duty.

"**Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or**

value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

"SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the PROPERTY OF EVERY PERSON WHO MAY DIE AS AFORESAID for twenty years, or until the same shall within that period be fully paid to and discharged by the United States; and EVERY EXECUTOR, ADMINISTRATOR OR TRUSTEE BEFORE PAYMENT AND DISTRIBUTION TO THE LEGATEES OR ANY PARTIES ENTITLED TO BENEFICIAL INTEREST therein, SHALL PAY TO THE COLLECTOR OR DEPUTY COLLECTOR OF THE DISTRICT OF WHICH THE DECEASED PERSON WAS A RESIDENT, the AMOUNT OF THE DUTY OR TAX ASSESSSED UPON SUCH LEGACY OR DISTRIBUTIVE SHARE, and shall also make and render to the said collector or deputy collector a schedule, list or statement in duplicate, of THE AMOUNT OF SUCH LEGACY OR DISTRIBUTIVE SHARE, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officers having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement shall contain THE NAMES OF EACH AND EVERY PERSON ENTITLED TO ANY BENEFICIAL INTEREST THEREIN, TOGETHER WITH THE CLEAR VALUE OF SUCH INTEREST, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector,

shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by EVERY TRIBUNAL WHICH, BY THE LAWS OF ANY STATE OR TERRITORY, IS, OR MAY BE, EMPOWERED TO DECIDE UPON AND SETTLE THE ACCOUNTS OF EXECUTORS AND ADMINISTRATORS. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the CLEAR VALUE OF SUCH BENEFICIAL INTEREST, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court,

and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge or custody any record, file or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge or custody any such records, files or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of $500: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law had been complied with by the officers of the Government."

In the *Knowlton* case this Court had occasion to discuss in great detail the general topic of inheritance taxes and to review their history in this country and in England.

It was claimed by the plaintiffs in error, in support of the proposition that the tax was unconstitutional, that the liability to the tax was determined by the value of the entire personal estate of the decedent, or, if not, then the progressive rate on each legacy or share was determined by the value of the whole personal estate. In discussing this point the Court says at page 65:

> "The opening words of Section 29 may, for clearness, be thus arranged:
>
> "That any person or persons having in charge "or trust as administrators, executors or trustees "any legacies or distributive shares arising from "personal property, * * * passing, after the "passage of this act, from any person possessed "of such property, either by will or by the intes- "tate laws of any State or Territory, * * * "shall be, and hereby are, made subject to a duty "or tax to be paid to the United States as follows, "that is to say," etc.
>
> "Thus collocated *the statute clearly imposes the "duty on the particular legacies or distributive "shares, and not on the whole personal estate. It "does not say that the tax is levied on the personal "estate left by the deceased person, but it is imposed "on legacies or distributive shares arising from "such property.*"

At page 64 the Court says:

> "*The tax is on the passing of legacies or distributive shares of personalty* with a progressive rate on each separately determined by the sum of each of such legacies or distributive shares."

And at page 78, referring to this construction, the Court says :

> " Its correctness is at once apparent when the " other views are disposed of. As the ' whole " amount of such personal property as aforesaid ' " relates to the sum of each legacy or distributive " share considered separately, it follows that all " legacies not exceeding ten thousand dollars are " not taxed, and that those above that amount are " taxed primarily by the degree of relationship or " absence thereof, specified in the five classifica- " tions contained in the statute, and that the rate " of tax is progressively increased by the amount " of each separate legacy or distributive share."

(b) This duty, therefore, is imposed upon the right or privilege of the legatee or distributee of succession to the legacy or share by virtue of a will or of the intestate laws of a State or Territory, as distinguished from the right or privilege of the owner of the estate to dispose of it by will or to have it pass under the intestate laws.

Under the construction given to the act by this Court in the *Knowlton* case, it is quite immaterial how large an estate is left by the decedent. Whatever its value, no tax accrues unless the estate passes by a will or under the intestate laws of a State or Territory to beneficiaries other than the husband or wife of the decedent in one or more legacies or shares of over $10,000 in value. The rate and amount of duty are determined primarily by the relationship of the beneficiary to the decedent, and secondarily by the value of the legacy or share, and the duty when paid is to be deducted from or charged against not the entire estate, but each legacy or share upon the passing of which it is assessed.

The intestate, for example, who dies possessed of personal property worth $50,000, and leaves a widow entitled to one-half his estate and three children entitled each to one-sixth, enjoys no greater or less priv-

ilege of disposition than another intestate who dies possessed of the same amount of personal property, leaving a widow entitled to one-half and one child entitled to the other half. Yet, in the first instance, no tax accrues, in the second a tax of three-quarters of one per cent accrues on the passing of the distributive share to the child. A testator bequeaths fifty legacies of $10,000 each to strangers in blood and no tax accrues; another testator bequeaths $500,000 to his adopted child and a tax of $50,000 accrues on the passing of that legacy. The schedule which the executor is required by Section 30 to render to the collector is to contain a statement of the value of each legacy or share, and the tax is to be paid, not when letters are taken out, but before payment or distribution to the legatee or distributee. The act regards only the beneficial interest of the legatee or distributee and not the right, privilege or property of the decedent.

Dowell, in his History of Taxation (London, 1884), Vol. III., p. 138, classifies death duties as follows:

> "SECTION I. The probate, administration and "inventory duties.
>
> "SECTION II. The Legacy and Succession "Duties. * * * There is not any connection "between the taxes comprised in Section I. and "those under Section II. The history of the "taxes is distinct."

SECOND.

IT MUST BE CONCLUSIVELY PRESUMED THAT CONGRESS DID NOT INTEND TO IMPOSE ANY DUTY UPON THE PASSING OF LEGACIES UNDER THE WILLS OF NON-RESIDENT TESTATORS OR OF DISTRIBUTIVE SHARES OF THE ESTATES OF NON-RESIDENT INTESTATES.

(a) The only question to be considered is as to the proper construction of the language of the statute.

We insist that in this case the true question is not, as argued in behalf of the Government, whether the property of non-residents is to be declared exempt from the general terms of the act, but whether Martinez, the ancillary administrator, had in charge or trust any legacies passing by will, or any distributive share passing by the intestate laws of New York, within the meaning of the language of the act.

The statute should be construed strictly in favor of the taxpayer.

In our former brief, at pages 5-8, we cited a large number of cases on this point, which we need not repeat, but we would add to them the following extract from the opinion of this Court by Mr. Justice BREWER in *Treat vs. White*, 181 U. S., 264 :

> "It is also true, as said by this Court in *United States vs. Isham*, 17 Wall., 496, 504, 'if there is a doubt as to the liability of an instrument to taxation, the construction is in favor af the exemption, because in the language of POLLOCK, C. B., in *Gurr vs. Scudds*, 11 Exchequer, 191, a tax cannot be imposed without clear and express words for that purpose. With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and any doubt in respect to its meaning is to be resolved in favor of the taxpayer.' "

(b) The 29th and 30th Sections of the War Revenue Law of 1898 are a substantial re-enactment of the corresponding sections of the Acts of 1862 and 1864, and they were based upon the English Legacy Duty Act of 1796.

We have already quoted the Act of 1898, showing its substantial identity with the Act of 1864. The substantial identity of the two acts and the close similarity of the Act of 1864 to the English Act of 1796 are fully discussed in the *Knowlton* case. On this point it is sufficient to quote the following extracts from the very able and exhaustive opinion of Mr. Justice WHITE:

> " In sections 111 and 112 of chapter 119, act of July 1, 1862 (12 Stat., 433, 485), a legacy tax was again enacted. Like in character to the act of 1797, this was a tax imposed on legacies or distributive shares of personal property. But in the same chapter was contained still another form of death duty. By section 194 a probate duty, proportioned to the amount of the estate, and to be paid by way of stamps, was levied. The result of the act of 1862, therefore, *was to cause the death duties imposed by Congress to greatly resemble those then existing in England; that is, first, a legacy tax, chargeable against each legacy or distributive share, and a probate duty, chargeable against the mass of the estate. The only difference between the system created by the act of 1862, and that existing in England was that the act of 1862 did not embody the succession tax provided for in England, by which interests in real estate, passing by death, were subject to a duty. . . . . The act of 1864, however, added, in separate sections, a duty on the passing of real estate, in substantial harmony with the principle of the succession tax expressed in the English Succession Duty Act. Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress—*

leaving out of view the differences in rates and the administrative provisions—*were substantially identical, and of a three-fold nature; that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy, or distributive share, of personalty, and a succession duty charged against each interest in real property.* * * *

"Whilst the general plan of the act of 1864 shows that its framers had in mind the English law, *this fact was conclusively demonstrated by Section 127, wherein the succession, or real estate inheritance, tax was defined in substantially similar terms to that contained in the English Succession Duty Act.* The identity of the conception embodied in the act of 1864, with that existing in England, was observed by this Court in Scholey vs. Rew, 23 Wall., 331, where in holding that the subject matter of the assessment of a succession tax was the devolution of the estate, or the right to become beneficially entitled to the same, etc., the Court said (p. 349):

"'Decided support to the proposition that such is the true theory of the act is derived from the fact that *the act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction.*'"

Knowlton vs. Moore, 178 U. S., 51, 52.

It is to be noted that the probate and succession duties embodied in the Act of 1864, referred to by Mr. Justice WHITE, *which included the estates, personal and real, of non-resident decedents*, were not re-enacted in 1898.

(c) Under the administrative and judicial construction of the Legacy Duty Act of 1864 no tax accrued on the passing of the property of non-resident decedents.

ADMINISTRATIVE CONSTRUCTION.

On November 23d, 1867, the following official decision was made and published by the Commissioner of Internal Revenue for the information and guidance of all concerned.

"SUCCESSION AND LEGACY.

"U. S. Legatees and Successors of Foreign Testator or Intestate.

"Unless the testator or intestate who dies in a foreign country has a residence in the United States his legatees in this country are not subject to the legacy tax. But persons succeeding to real estate situate in the United States are liable to the succession tax, without reference to the place of residence of the devisor or predecessor."

6 Int. Rev. Record, p. 179, 1st column.

This ruling remained in force, so far as we have been able to ascertain, for some thirteen years, and until after the repeal of the act. It was never questioned, and no attempt was made by the Government to enforce payment of the tax on the part of those interested in the personal estates of non-residents until Commissioner *Raum* in the year 1882 had a test suit brought in Massachusetts.

JUDICIAL CONSTRUCTION.

The suit referred to, under which the Act of 1864 was finally and judicially construed, is reported as *United States vs. Hunnewell*, 13 Fed. Rep., 617. This case is cited in our former brief at page 13, but not at length. It is so important a decision in our favor that we shall refer to it fully.

The facts were essentially the same as in the case at bar. The decedent was a resident of France; her will

was executed in conformity with the laws of France, and was proved there, and by its terms her property was given to her son, who was also a resident of France. The personal property situated in the district of Massachusetts represented only a small part of the decedent's estate. The cause was heard in 1882 before Justices HORACE GRAY and LOWELL. The former, then as now an Associate Justice of this Court, wrote the opinion, in the course of which he said :

> " The cases cited at the bar exhibit some difference of opinion upon similar questions. In Great Britain it has been determined upon much consideration by the highest authority that an act of parliament imposing a legacy duty does not apply to property of a person whose domicile at the time of his death is not within the realm (Thomson vs. Advo. Gen., 12 Clark & F., 1 ; s. c., 4 Bell, 1). In the courts of North Carolina and of Missouri, on the other hand, it has been held that all personal property within the state is liable to such a duty, whether the owner's domicile at the time of his death is within or without the state (Alvany vs. Powell, 2 Jones Eq., 51 ; State vs. St. Louis County Court, 47 Mo., 594).
>
> " But Congress, in the Act of 1864, *has made its intention clear that the legacy duty should be payable on the estates of those persons only whose domicile at the time of their death is within the United States.* Section 124 imposes a duty on legacies or distributive shares arising from personal property ' passing from any person possessed of such property, either by will or by the intestate laws of any state or territory ; ' *it does not make the duty payable when ' the person possessed of such property ' dies testate, if it would not be payable if such person died intestate ;* and, if Madame de la Valette had died intestate, her son would not have taken a distributive share ' *by the intestate laws of*

any state or territory,' but, if at all, by the law of France, the domicile of his mother at the time of her death. And section 125, by requiring the executor or administrator to pay the amount of this duty 'to the Collector or Deputy Collector of the *District of which the deceased person was a resident,*' leads to the same conclusion."

We do not understand that, as the Solicitor-General claims, this case did not receive full consideration by the Court. It was a test case, involving large interests, and submitted on an agreed statement of facts. Under the terms of the Act of 1864, as under the present act, the tax, if leviable, was a lien on all the property of every non-resident who had died since 1864 for 20 years from his death, and, therefore, if the act had been held to apply to non-resident estates, the entire amount of taxes in arrears could have been sued for and collected. Apparently all the authorities then in existence were cited by counsel, and the decision was rendered by two eminent jurists after a full presentation of the case and careful consideration of the statute.

The Hunnewell case was cited and followed in *United States vs. Morris,* 27 Fed. Rep., 341, and has never been questioned as an authority until now.

(d) The English Courts, prior to the enactment of the Act of 1864, had, without exception, construed the English Legacy Duty Act of 1796 so as not to include legacies passing by the wills of non-residents, and in 1865 they gave the same construction to the Succession Duty Act of 1853. These constructions have been upheld by a long line of decisions up to the time of the passage of the Act of Congress of June 13th, 1898, now before this Court.

The English Legacy Duty Act, with a few changes in rate and administrative features, has been in force in England since 1780. The act in force in 1864 and

now in force was passed in 1796 (36 Geo. III., C. 52; *Hanson Death Duties*, p. 391 *et seq.*).

The enacting portion of this act, § 2, provides:

> "II. And be it further enacted, that, upon *every legacy* specific or pecuniary or of any other description of the amount or value of twenty pounds or more, *given by any will or testamentary instrument* of any person who shall die after the passing of this Act, *out of the personal estate* of the person so dying, and also upon the clear residue and upon every part of the clear residue of the personal estate * * * which shall remain after deducting debts, funeral expenses and other charges * * * *or upon intestacy*, there shall be raised, levied, collected and paid * * * the several duties, and after the rates and in manner following—that is to say, where any such legacy, or any residue or part of residue * * * shall be given or shall pass to or for the benefit of a brother or sister of the deceased, * * * there shall be charged a duty of two pounds for every one hundred pounds of the value of any such legacy," etc.

The construction of this act is thus referred to by *Hanson* in his treatise on death duties at page 423:

> "The personal estate intended by the act must evidently be such as is situate within this country, that being, to use the words of Lord COTTENHAM in *Arnold vs. Arnold* (2 M. & C., at 270) 'the limit of the sphere of the enactment,' and, as all personal property of a movable nature is considered to follow the person of the owner so as to be, in construction of law, situate at the place of his domicile, it is a necessary consequence that the domicile of the deceased testator or intestate at the time of his death, and not the actual local

situation of the property, is the proper test of its liability to duty.

"This doctrine was not, however, distinctly adopted to its full extent until the year 1845, when it was finally declared to be law by the decision of the House of Lords in *Thomson vs. Adv.-Gen.*, (13 Sim., 153, 12 Cl. & Fin. 1), * * * where it was distinctly settled, that the local situation of the property is an immaterial circumstance, and that the liability of personal estate to duty depends wholly upon the domicile of the owner at the time of his death, without reference to its actual locality. The testator in that case was a native of Scotland, but died domiciled in Demerara, leaving personal property in Scotland, and having left legacies to persons in that country. The Scotch Court of Exchequer, in the first instance, decided that legacy duty was payable, and the case was then carried to the House of Lords, who heard it with the assistance of the Judges, and eventually overruled the decision of the Court below. TINDAL, C. J., delivering the unanimous opinion of the Judges to the effect that no legacy duty was payable under such circumstances, observed :

"It is admitted in all the decided cases that "the very general words of the statute, 'every leg- "acy given by any will or testamentary instrument "of any person,' must of necessity receive *some* "limitation in their application ; for they cannot "in reason extend to every person everywhere "whether subjects of this Kingdom or foreigners, "and whether at the time of their death domiciled "within the realm or abroad ; and as your Lord- "ships' question applies only to legacies out of "personal estate, strictly and properly so called, "we think such necessary limitation is that *the* "*statute does not extend to the wills of persons at* "*the time of their decease domiciled out of Great*

" *Britain, whether the assets are locally situated* " *within England or out.*"

" And Lord LYNDHURST, C., in giving judgment, adopted this view and held that the circumstance that the testator's property was actually situate in this country at the time of his death did not make any difference. 'It was personal property, and, following the principle laid down in the case of *Ewin, it must be considered as property within the domicile of the testator* in Demerara ; and it is admitted that, if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty (13 Sim., 161)' "

In 1853 Parliament passed the "Succession Duty Act," 16 and 17 Vict., C. 51, which included personal as well as real property, in which respect it differed from the succession duty in the Act of Congress of 1864. This act provided :

" II. Every past or future disposition of property, by reason whereof any person has or shall have become beneficially entitled to any property, or the income thereof, upon the death of any person, * * * shall be deemed to have conferred or to confer on the person entitled, by reason of any such disposition or devolution, a 'succession,'" etc., etc.

The act came before the Lord Chancellor and the Court of Appeals in Chancery in November, 1865, in the case of *Wallace vs. Attorney-General*, 1 Ch. Ap., 1. Lord CRANWORTH, in the course of his opinion, says (p. 5) :

" The question raised in the case of *Wallace vs. Attorney-General* is one of great importance, *whether succession duty is payable on legacies given by the will of a person domiciled in a foreign coun-*

try. The duty is claimed under the Succession Duty Act, 16 & 17 Vict., C. 51. * * *

" By the second section of the act every disposition of property by reason whereof *any person shall,* on the death of another *become entitled* to any property, shall be deemed to confer on the person *so becoming entitled* a succession, and on that succession a duty is imposed by Section 10.

" The question, therefore, is whether where a person domiciled abroad makes a will giving personal property in this country by way of legacy the legatee is a person becoming entitled to that property within the true intent and meaning of the 2d Section. I think not. I think that in order to be brought within that section *he must be a person who becomes entitled by virtue of the laws of this country. Any wider construction would give rise to difficulties hardly to be surmounted.* In collecting the duties the officers of the revenue will in general find no difficulty, supposing the duties to be imposed only on persons entitled under our own laws. * * * *But who the parties entitled under a foreign will are is a question which no knowledge of our laws will enable them to solve.* It can only be ascertained by evidence in every case showing what the foreign law is and who is entitled under it.

* * * * * *

" These are all difficulties on the surface and probably many more might be discovered by further investigation. The consideration of them has satisfied me that the only safe way of solving this question, as that relating to legacy duty, is to consider the duty as imposed only on those who claim title by virtue of our law. I must add that the silence of the Act on this point seems to me strongly to show that the intention of the Legislature was such as I have stated. The statute was passed only about eight years after the decision

of the House of Lords in Thomson v. Advocate-General, and when the non-liability to legacy duty of legatees under the wills of persons not domiciled in this country had been fully established after having for a long time previously given rise to much discussion. *I can hardly think that the Legislature intended by a side wind, as it were, and without any preamble indicating its intention, to do what, without exciting attention, would practically operate as a reversal of that which, after frequent discussions in the different courts, had established the rights of persons claiming as legatees under foreign wills.* * * * Parliament has, no doubt, the power of taxing the succession of foreigners to their personal property in this country; but I can hardly think that we ought to presume such an intention unless it is clearly stated."

(e) Congress, in re-enacting the Act of 1864, must be deemed to have adopted the administrative and judicial construction of that act and the construction of the English Legacy Duty Act by the English Courts.

In addition to the authorities cited on this point at pages 18, 19 and 20 of our former brief, we call the Court's attention to the following cases:

Minor vs. Merchant's Bank, 1 Pet., 46.
The Abbotsford vs. Johnson, 98 U. S., 440.

(f) Congress, by adopting the language of the Act of 1864 instead of the language of the State inheritance tax laws, declared its intention not to include the passing of the property of non-residents.

The Solicitor-General cites a number of decisions of the State courts and from them contends that Congress intended by this act to modify the *mobilia*, etc., rule. An examination of these cases and of the statutes thereby construed shows that in all these cases the acts under construction either expressly included

non-residents or expressly applied to all property within the State, in which respects they differ entirely from the Act of Congress under consideration.

The principal collateral inheritance tax statutes of the States referred to by the Solicitor-General will be found in Don Passos on Inheritance Tax Law (2d Ed.), as follows:

New Jersey, page 459; act passed May 15th, 1894, similar in form to New York Act of 1885 construed in the Enston case.

Pennsylvania, page 467; present act passed May 6th, 1887, provides that "all estates, real, personal and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State."

Massachusetts, page 477; act passed in 1891 applies to "all property within the jurisdiction of the commonwealth, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible."

Maine, page 484; act passed 1893, copied from Massachusetts act.

Ohio, page 489; act passed 1893, copied from Massachusetts act.

Connecticut, page 498; act passed 1889, same as Massachusetts act.

Maryland, page 503; act passed 1888 applies to "all estates, real, personal and mixed, being in this State."

California, page 510; act passed 1893 copied from New York Act of 1887 discussed in Romaine case below.

Illinois, page 518; act passed 1895 very similar to New York Act of 1887; same provision as to non-residents.

Pennsylvania Decisions.

The present Pennsylvania Act takes the place of the Act of 1826. That act as amended by the Act of 1850 (Pamph., pp. 170, 227) provides that "all estates, real,

personal or mixed, passing from any person * * * being within this Commonwealth, either by will *or under the intestate laws thereof* to any person other than to father, etc., shall be liable to a tax," etc. This act came before the Supreme Court of Pennsylvania in the case of *Orcutt's Appeal*, 59 Pa. St., 179, decided in 1881.

In that case the facts were almost identical with those in the case at bar. A citizen of New Jersey died, leaving personal property in New Jersey and a will executed in that State, where it was duly probated and letters testamentary therein issued. The testator also left certain United States bonds deposited with a trust company in Pennsylvania. Ancillary administration, *c. t. a.*, was taken out in that State, and the bonds disposed of by the ancillary administrator, who held the proceeds. The liability of the said bonds, or their proceeds, to said tax, was the question before the Court.

Mr. Justice STERRETT delivered the opinion of the Court, holding that the bonds were not subject to the tax. At page 185 he says:

> "As it is, however, the fund here is in the hands of a purely ancillary administrator, *whose sole function it was* to receive from the United States Treasury the amount called for by the bonds, *and transmit the same*, less costs and charges, *to the executrix in New Jersey for administration, according to the laws of that State and the directions of the testator.* * * *
>
> "The tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts and rightful claims of third parties are paid. * * * It is on *the net succession* to the beneficiaries, and not on the securities in which the estate of the decedent was invested (Commonwealth's Appeal, 10 Casey, 204; Strode vs. Comm., 2

P. F. Smith, 181). How, then, is it possible to impose a tax on this fund when it has never been ascertained judicially how much or whether any of it will go to the collateral legatees? * * * The court of the testator's domicile is the only one that can properly determine how much of it will ultimately go to the collateral legatees.

"Again, the tax * * * is further restricted by defining the mode in which they shall pass—viz., estates being 'within this Commonwealth' and 'passing from any person,' etc., *either by will or under the intestate laws thereof.* It is clear, therefore, that estates *not passing by a will that is operative within the state or under the interstate laws* thereof * * * are not within the purview of the act."

The present Transfer Tax Law in New York:

The old Collateral Inheritance Tax Law of 1887 discussed in the *Romaine* case, cited hereafter, was repealed in 1892 by the enactment of the "Transfer Tax Act" (L. 1892, Ch. 399), which has in substance been codified as Article X. of the Tax Law, §§ 220–243, enacted in 1896.

That law provides (Tax Law, § 220):

"A tax shall be * * * imposed upon the transfer of any property, real or personal, of the value of $500 or over, or of any interest therein, or income therefrom, * * * to persons or corporations * * * in the following cases.

"1. When the transfer is by will or *by the intestate laws of this State* from any person dying seized or possessed of the property *while a resident* of the State.

"2. When the transfer is *by will or intestate law* of property within the State and the decedent

was a non-resident of the State at the time of his death.

"3. When the transfer is of property made by a resident or by a non-resident, when such non-resident's property is within this State, by deed, etc., made in contemplation of the death of the grantor, etc."

The Court will see that this act speaks of the passing of the property of a resident intestate "by the intestate laws of this state," and of the passing of the property of a non-resident intestate "by intestate law."

Evidently the Legislature by thus changing the language with respect to the passing of the property of a non-resident intestate meant to avoid any ambiguity which would have arisen had Section 2 read: "When the transfer is by the *intestate laws of this State* of property within the State and the decedent was a non-resident." In that case the real property of the non-resident which passes by the intestate laws of New York would have been taxed, while the personal property which under the decision in the *Romaine* case, cited below, does not pass by "the intestate laws" of New York, would have escaped.

It is preposterous to claim that the Act of Congress should be construed as if all these minute and detailed provisions of the New York act, framed to include property held not included in former acts by the Court of Appeals, had been expressly enacted by Congress.

All of the State inheritance tax laws above referred to were in force when Congress passed this Act of June 13th, 1898, all of them either mention non-residents by name or expressly include all property tangible or intangible within the State. They are all analogous to the English probate or estate duty rather than to the legacy duty, yet when Congress enacted this act it chose not the language of the State laws, but the language of the old Act of Congress of 1864, based on the English act of 1796, which had been construed by

the administrative department and by the Courts. There could not be a more clearly implied declaration of an intention not to include the property of non-residents.

(g) The administrative provisions of Section 30 of the act fail to provide any method for assessing or collecting the tax in the case of non-resident decedents.

The liability to the tax depends, as we have said, upon the amount of each legacy. The rate of tax is determined by two factors, the relationship of the beneficiary to the decedent and the value of the legacy or share, according to which value the rate is progressively increased. The tax is to be paid to the Collector of the district of which the decedent was a resident and before such payment the executor is to prepare a schedule showing the value of each legacy on which the tax is to be assessed. The tax is to be paid before payment or distribution of the legacy or share.

These provisions are wholly inapplicable to the case of property belonging to an alien decedent.

In the case at bar Elizalde left a personal estate of several millions in Spain, and the bonds found in New York amounted to $225,000. Suppose he had made bequests to strangers and collaterals some of $20,000, some of $100,000, some of $1,000,000 and such bequests had amounted to more than one-third of his estate, suppose, further, that in Spain he had left creditors to whom he was indebted in large amounts; suppose, also, that $125,000 had been in New York and $100,000 in Boston. In such a case and it is but supposing a case which is very likely to arise in relation to many non-resident estates, how would it be possible to compute the tax? In the case at bar the collector treated the $225,000 as one legacy passing to the son, but in the hypothetical case it would be impossible to say whether the property here was to pass as legacies or in the payment of debts, and if as legacies how much of it would be appropriated to the payment of any particular legacy. In endeavoring to

fix the tax the collector in New York and the collector in Boston would be confronted with a maze of legal technicalities involving among other things the marshalling of assets, the principle of *legitime* under the Spanish law the question as to which collector had jurisdiction, none of which matters would appear in the "schedule, list or statement." The collectors would have to proceed by the merest guesswork and an endless amount of litigation would ensue in the Federal Courts.

In such a case the ancillary administrator, who is the mere agent of the foreign executor for the purpose of collecting and transmitting the assets, could not possibly make out the schedule of the legacies, as their value can only be ascertained upon the final distribution at the domicile of the decedent.

An analogous point was passed upon by the Supreme Court of Pennsylvania in *Matter of Coleman's Estate*, 159 Pa. St., 21. In that case it was held that where a non-resident testatrix by her will directed all her real estate, including real estate in Pennsylvania, to be sold and the proceeds used to discharge certain legacies, the proceeds of sale of the local lands were not subject to the payment of the inheritance tax above quoted. The opinion of the Court below was adopted by the Supreme Court and is reported in full. The opinion after reviewing *Small's Est.*, 151 Pa. St. 1, *Bittinger's Ap.*, 129 Pa. St., 338, and *Miller vs. Com.*, 111 Pa. St., 321, says :

> "If bonds, notes, stocks, bonds and mortgages be intangible personal property, surely this is. The administration here being ancillary, the legatees have no status. Local debts and expenses having been paid, it is the sole duty of the administrator to transmit the balance to the domicile for administration. The collateral tax is imposed only on what remains for distribution after all the expenses of administration, debts and rightful

claims of third parties, domestic as well as foreign, have been paid or provided for; it is only the net balance that is liable. How, then, is it possible to impose a tax on this fund when it has never been ascertained judicially how much or whether any of it will go to the collateral legatees? Who can tell how much of the fund may be successfully claimed by creditors and others as against the legatees? The court of the domicile is the only tribunal that can determine how much will ultimately go to them (*Orcutt's Appeal*, 97 Pa. St., 179)."

On this point see, also, *Orcutt's Appeal*, *supra*, p. 23, and *Wallace vs. Atty. Gen.*, *supra*, pp. 20, 21.

(h) The authorities cited in behalf of the Government's contention have no bearing upon the question as to the true construction of the act.

The Solicitor-General, at pages 9–13, cites the cases of *Pullman Palace Car Co. vs. Penna.*, 141 U. S., 18, 22, *Adams' Express Co. vs. Ohio*, 166 U. S., 185, 224, 225, and *Bristol vs. Washington Co.*, 177 U. S., 133. All that these cases decide is that a State has power to tax personal property within its limits belonging to non-residents.

We concede that proposition, but it has no bearing whatsoever on the question before the Court. We may however say, in passing, that all of these cases recognize the force of the *mobilia* rule where not expressly repealed by statute.

At pages 14–16 he cites *Dos Passos* and the *Enston* and *Romaine* cases. We shall discuss these cases fully and show that they are strong authorities in support of our contention. The remark in the extract from *Dos Passos*, that "in such cases the theory seems to be that for the purposes of this tax the succession is deemed to take place under the laws of the taxing State," is not borne out by any of the cases cited. It is a mere opinion of the author which is directly

negatived by the opinion of the New York Court of Appeals in the *Romaine* case, which we shall presently discuss.

Third.

The legacy and distributive share do not pass under the testate or intestate laws of New York, and are not subject to the payment of the duty imposed by the act of Congress.

The United States Statute imposes a tax on the passing of legacies or distributive shares "either by will or by the intestate laws of any State or Territory," and the question is, did the legacies and shares in this case pass by will or by the intestate laws of the State of New York where the property was found. This is the controlling question.

There is no question as to the Transfer Tax Law or any other tax law of New York, or any other State. The only question is as to the intestate laws of New York in cases where the deceased is an alien domiciled abroad leaving choses in action in the hands of his agent in New York.

Both sides agree that the securities found here must be distributed according to the laws of Spain; but the plaintiff in error below claims that it is the law of the State of New York that the securities shall be distributed according to the laws of Spain, and that, therefore, within the meaning of the United States Statute, they passed "by the intestate laws" of New York. Defendant in error, on the contrary, claims that by the law of New York the maxim "*mobilia sequuntur personam*" applies, and that by that maxim the securities are conclusively presumed to be in Spain and to pass by her laws, and are not affected by the intestate laws of New York.

With this question the transfer tax acts of New York have nothing to do, as we have already shown.

No one questions the power of New York to tax any person no matter where he is domiciled, and, whether an alien or citizen, in respect to any property or securities found within its borders, or the power of the United States similarly to tax any person in respect to property or securities found within their borders. Whether, however, New York does or does not tax in such case is not the question under the United States legacy tax statute, for under that statute the sole question is whether the securities in this case "passed" under "the *intestate* laws" of New York:

FIRST. The decisions of the Courts of New York have conclusively established that in a case like this the property and securities pass by the foreign law and not by the laws of the State of New York.

In the *Enston* case, 113 N. Y., 181, it is said:

> "It is a general rule of the law that such property attends the owner and has its *situs* at his domicile. It is true that this is a fiction, but it is a fiction *which must prevail* unless there is something in the policy of the statute or its language which shows a different intent."

Here there is a clear recognition that it is the maxim "mobilia, &c." which constitutes the rule—the conclusive presumption that the securities are actually *situated where the owner is domiciled* that controls the Court. Not that it is the intestate law of the State of New York that the securities be distributed according to the law of the domicile, but that it is the law of New York that such securities, though found here, are conclusively presumed to be and legally are, not here, but in the country of the domicile of their owner—in this case in Spain—and that they pass by the law of Spain.

In *Cross vs. U. S. T. Co.*, 131 N. Y., 339, 340, the language is used which we have cited in our original brief, pages 22 and 23.

This is an emphatic case because it held valid the will of a testator domiciled elsewhere, but void by our statutory law on the specific ground that the law of the domicile prevailed not only as to the form of execution of the will, but also as to the validity of its provisions.

See also on this point,

Dammert vs. Osborn, 141 N. Y., 564, 567.

In *Parsons vs. Lyman*, 20 N. Y. 103, at 112, the rule was early stated that :

> " It is an established doctrine, not only of international law, but of the municipal law of this country that personal property has no locality. It is subject to the law which governs the person of the owner * * * as to its transmission by last will and testament and by succession upon the owner dying intestate. * * * The principle no doubt has its foundation in international comity ; but it is equally obligatory *as a rule of decision* in the Courts as a legal rule of purely domestic origin. It does not belong to the Judges to recognize or deny the rights which individuals may claim under it at their pleasure or caprice, but, it having obtained the force of law by user and acquiescence, it belongs only to the political government of the State to change it whenever a change becomes desirable.

Also, that a foreign administrator could give an effective receipt for assets found here, and that for such assets so collected here the foreign administrator was not accountable here when thereafter he took out letters here.

Parsons vs. Lyman has been affirmed in many cases in New York—among the latest being *Matter of Fitch*, 160 N. Y., 92; *Cross vs. U. S. T. Co.*, 131 N. Y., 340.

In *Matter of Prout*, 128 N. Y., 74, it is said:

> "The unquestioned rule of the *common law* that the succession to and the distribution of the estate of an intestate is governed by the law of the domicile makes security there taken on the granting of letters of administration covering the whole personal estate of the intestate an adequate protection to all parties interested." * * *

In *Schluter vs. Bowery Savings Bank*, 117 N. Y., 125–129, it was held that a foreign administrator could give an effective receipt though he had not taken out letters in New York.

The original Collateral Inheritance Act of New York (L. 1885, Ch. 483) provided in Section 1 that after its passage "all property *which shall pass by will or by the intestate laws of this State* from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within the State," should be subject to a tax, etc.

> "When this statute came before the courts for construction, it was held not to apply to property within the state, either real or personal, that passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, and that it was limited in its effect to property so passing from resident decedents (*Matter of Enston*, 113 N. Y., 174; *Matter of Tulane*, 51 Hun, 213; *Matter of Clark*, 9 N. Y. Supp., 444). In 1887, however, the Legislature amended the act so that it now provides that 'all property which shall pass "'by will *or by the intestate laws of this state* from "'any person who may die seized or possessed of "'the same while a resident of this state, *or if*

" ' *such decedent was not a resident of this state at*
" ' *the time of his death*, which property, or any
" ' part thereof, shall be within this state,' etc.
" (Laws of 1887, Chap. 713, §1)."

This Act of 1887 came before the Court of Appeals in *Matter of Romaine*, 127 N. Y., 80. In that case (from which the above quotation is taken) the question before the Court was whether or not any tax accrued in respect to the property of a non-resident intestate who died in 1888 leaving certain securities consisting of stocks and bonds, mortgages and savings bank deposits to which certain nieces were entitled to succeed under the Laws of Virginia the domicile of the intestate. The Court after referring to the two acts in the language above quoted says at page 84:

" It must be assumed that the legislature in passing the amendment *intended to make some change*, and the expression 'or if such decedent ' was not a resident of this State at the time of ' his death ' suggests what that change was. Before it was amended the act, as was subsequently held, applied only to one class of persons, resident decedents, but by the amendment it is made applicable to another class, non-resident decedents. But does it apply to all persons belonging to these two classes? It is not denied that it applies to all resident decedents and to all non-resident testators, but it is contended that it does not apply to non-resident intestates, because property 'which shall pass * * * ' by the intestate laws of this State ' is expressly mentioned to the implied exclusion of property passing by the intestate laws of other States. This is the position of the appellant. * * * It is difficult, however, to see why the legislature should discriminate simply for purposes of taxation between the property of a non-resident de-

cedent who made a will and of one who did not. * * * Although '*the intestate laws of this state*' are named as a source of title, they are not the exclusive source, *and neither necessarily nor naturally apply to the property of non-resident decedents* named at a later point in the section. In this discussion it is assumed, as the appellant claims, that the personal property of such persons passes according to the laws of the state where they reside. By comparing the original with the amended act and analyzing the provisions of the latter in the light thus afforded, we think that the legislature intended by the forepart of the sentence under consideration to provide *for succession to the estates of residents, to which 'the intestate laws of this state' apply;* that after providing for that class a change is made, indicated by the use of the disjunctive particle, 'or,' which suggests a transition to another subject, and introduces another class, non-residents, who are also provided for, and then each class is carried forward to the taxing clause which embraces both. As thus construed, '*the intestate laws of this state*' *have no application to the second class*, being separated from it by the word 'or' and confined to that clause of the sentence in which they occur. * * * The fiction of law that personal estate has no *situs* away from the person or residence of its owner is done away with *to a limited extent and for a specified purpose*, and the truth is substituted in its stead as a rule of action."

From the above it will be seen that the highest Court of the State of New York has emphatically denied that the property of a non-resident intestate passes "by the intestate laws of the State." When Romaine died the sections of the New York Code of Civil Procedure cited by the Solicitor General were all in force. The Counsel for the State of New

York, among them Mr. Dos Passos, whose work on inheritance taxes is so fully cited and relied on by the Solicitor General, in their briefs emphasized the point that Romaine's property passed by the intestate laws of New York. It was evident that the Legislature intended by the amendment of 1887 to reach the property of non-residents, and the Court of Appeals very properly so construed the Statute as to carry that intention into effect, but if the law were, as is now claimed by the Solicitor General, that the personal property in New York of a non-resident decedent, passed by the intestate laws of New York, the Court of Appeals, in deciding the Romaine case, would undoubtedly have held that the terms of the act were perfectly clear, and that property of non-residents was included, *because it passed by the intestate laws of the State.*

The direct contrary was held. The Court said that if the act meant that only the property of intestates which passed by the intestate laws of New York, was included, then the act did not apply to the property of non-resident intestates, because their property passed by the laws of their domicile. The Court, therefore, in order to effectuate the intent of the Legislature adopted what seemed to be a forced construction, as is pointed out in the dissenting opinion of Judge HAIGHT (p. 90), who says :

> " If we are correct in this interpretation of the statute it follows that the tax in question was improperly imposed, for the reason that the property of the decedent found in this State was personal, and *the situs being with the owner, it would not pass by the intestate laws of this State* (Redfield Surrogate's Court [2d Ed.], 588)."

The highest Court of the State of New York having thus decided that " the intestate laws " of that State do not regulate the distribution of the personal property

of a non-resident intestate found within its borders and that such property does not within the meaning of a State statute *in pari materia* "pass by the intestate laws" of New York, this Court is bound by its universal practice in like cases to adopt the same construction of the phrase "the intestate laws of the State" as used in the act now under consideration. If there is any rule which is conclusively settled it is that the decision of the highest Court of a State as to the interpretation and construction of a State statute will be followed by this Court.

If we look outside of the decisions of the Courts of New York for the basis of the rule or maxim, "*mobilia*," etc., we find everywhere that it is based on the fiction that personal property and securities have their *situs* at the domicile of their owner, and not where they may actually be found.

The doctrine is stated by Chancellor KENT in his Commentaries, Vol. 2d, star paging 429, bottom paging 572, 12th Ed., 1873:

"But it has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened *sense of public policy and convenience*, that the disposition, succession to and distribution of personal property, wherever situated, is governed by the law of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happen to be situated." See, also, the following pages and notes:

Story's Conflict of Laws, § 37 and notes, also § 376 to 381.

Lord LOUGHBOROUGH says "It is a clear proposition not only of the law of England but of every country in the world where law has the semblance of a science that personal property has no locality."

"Wherever the domicile of the proprietor is there the property is to be considered as situate" (*Re*

Erwin, 1 Cromp. & Jery. 156 ; Story on Conflict of Laws p. 312, note to § 379).

Thus we find not only the common law of the State of New York and of England, but also the law of the several States of the continent of Europe, agree in the doctrine *mobilia sequuntur personam* and that the law of domicile governs. The rule was most clearly and comprehensively stated by this Court in *Ennis vs. Smith*, 14 How., 400, where it was said :

> "For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the *jus gentium*. Lord THURLOW speaks of it as such in the House of Lords in the case of *Bruce vs. Bruce*. ERSKINE, in his Institutes of the Law of Scotland (B 3, tit. 9, § 4, 644), says this rule is founded on the laws of nations. * * *
>
> "The rule prevails also in the ascertainment of the person who is entitled to take as heir or distributee. It decides whether primogeniture gives a right of preference, or an exclusive right to take the succession, whether a person is legitimate or not to take the succession, whether the person shall take *per stirpes* or *per capita*, and the nature and extent of the right of representation (Story's Conflict of Laws)."

See, also, *Dicey on Conflict of Laws*, 683, 684; *1 Williams on Executors*, 300, 310; *Story Conflict of Laws*, § 473 ; *Wharton Conflict of Laws*, 576. *2 Williams on Executors*, 1387.

Plaintiff in error, however, claims that it is the State law which prescribes that the rule of domicile shall prevail, and that, therefore, the property

passes by our law, and he refers to the New York statute—New York Code of Civil Procedure, § 2694 *et seq.*

That section provides in substance that the validity and effect of a will and the descent of real estate in the State "are regulated by the laws of the State without regard to the residence of the decedent," and that, "except where special provision is otherwise made by law," the validity and effect of a will, and the distribution of property other than real estate situated within the State, "are regulated by the laws of the State or country of which the decedent was a resident at the time of his death."

The statute does not enact that such property shall be distributed according to the laws of the decedent's domicile, but *declares* that such wills and property "*are regulated by the laws* of the state or country of which the decedent was a resident at the time of his death."

The statute, as we have seen, made no change in the existing law. It declared the common law of the State well settled, at least, since Parsons vs. Lyman, decided in 1859.

Ruckgaber vs. Moore, 107 Fed., 947.

The law as so declared is, and always has been, the law of England.

In *Thomson vs. Advocate-General*, and in every subsequent case, had it been held that it was the law of England, pursuant to which the property passed, the decisions must have been different, because in every case the decision was put directly upon the ground that the devolution of the property was by the law of the domicile.

In *Thomson vs. Advocate-General* (12 Clark & Finelly, 21), the Chancellor says: "I apprehend * * * that personal property in England follows the law of the domicile, and that it *is precisely the same* as if the *personal property had been in India at the time of the testator's death;*" and (p 22) "it must be

considered as property within the domicile of the testator, which domicile was Demarara."

Lord BROUGHAM said (p. 26), "but the personal property is in contemplation of the law whatever may be the fact, supposed to be within the domicile of the testator or intestate."

Lord CAMPBELL says (p. 29), although the property is in England at the time of his death, "in contemplation of law that property is supposed to be situated where he was domiciled, and, therefore, does not come within the act."

In *Wallace vs. Attorney-General* (L. R., 1 Ch. Appeals, p. 7) Lord CRANWORTH said that, to be within the section, he must be a person who becomes entitled by virtue of the laws of this country, and it was held, because domiciled abroad, he did not become so entitled.

On page 8 he says "the only safe way * * * is to consider the duty as imposed only on those who claim title by virtue of our law," and on page 9, "some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled *by virtue of the laws of this country.*"

Plainly enough, had the Court in these and similar cases regarded the law of England as prescribing the rule and giving the title because it was the law of England that the case was governed by the law of the domicile, the decision in those cases would have been the reverse.

Again we ask, in the light of these cases, can it be supposed that Congress, in enacting the law of 1898, did not intend to adopt the judicial construction of the legacy tax adopted from England, as well as the United States Act of 1864?

It remains only to refer again to the cases cited by the plaintiff in error respecting the maxim "*mobilia*," etc.

Counsel for plaintiff in error cites a number of cases to the effect that the maxim "*mobilia*,"

etc., has recently been greatly restricted. It will be found on examination that all those cases refer to a statutory restriction of the maxim, and, so far as this Court is concerned, they are all to the effect that there is nothing in the Constitution or laws of the United States to prevent the several States restricting the effect of that maxim to any extent that they desire. No one disputes that law. No one claims that the United States might not, if Congress had chosen, have provided that all property within the United States, although belonging to a person domiciled elsewhere, should be taxed. On the other hand, we submit that there is no case or dictum or suggestion anywhere to be found to the effect that, in the absence of direct and special provision by the legislative power, the maxim "*mobilia*," etc., does not prevail; and not only that, but that it prevails on the fiction conclusively presumed by the courts that the *situs* of the property is actually that of the domicile of the deceased.

The case of *Bristol vs. Washington County*, 177 U. S., 133, is a good illustration. There the State authorities had held that the State Statute was broad enough to include choses in action actually situated in the State and kept there for business purposes, but belonging to one domiciled out of the State. The United States Circuit Court accepted the ruling of the State authorities as to the State Statute on that subject, and held that there was nothing in the Constitution or laws of the United States in conflict with such ruling. There the Statute of Minnesota, as construed by her own administrative officers and by her Supreme Court, had provided that the maxim "*mobilia*," etc., should have a limited effect in the State of Minnesota, and that construction of the State statute by the highest Court of the State was followed by this Court.

All the United States decisions hold is that such special revocation or any revocation, or the absolute revocation, of the maxim by any state is within its

powers, and not in conflict with the Constitution or laws of the United States.

Story in his Conflict of Laws, Chancellor Kent in his Commentaries, and various Judges in England who have passed upon it, and all the cases in the United States which have considered it, unite in appreciation of its vast utility, of its tendency properly and satisfactorily to solve international questions, and it is worthy of remark that the first leading case on the subject, that of Bruce vs. Bruce in England, referred to in the opinion in the Thomson case, was that of an American citizen whose property in England was held not to be liable to the legacy tax because of the doctrine expressed in the maxin "*mobilia sequntur personam.*"

We submit, therefore, that by an unbroken line of decisions—we say unbroken, as the one or two cases to the contrary are hardly worth consideration—the doctrine of the maxim "*mobilia,*" etc., has been thoroughly established with reference to legacy tax statutes, and that it has always been upon the theory that the property, whether actual goods or securities, is in contemplation of law situated at the place of the domicile of the owner, and that in the absence of any express statute of the sovereignty where the goods are actually situated that maxim will prevail, and the Court must hold that the property actually is, for the purposes of this act where the domicile of the owner is, and the fact that the maxim may have been partially revoked or qualified in other matters and for other purposes has no bearing upon the question presented by this case.

We therefore submit that both the questions certified by the Court below should be answered in the negative.

November, 1901.

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